

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

THE OHIO BELL TELEPHONE  
COMPANY,

Plaintiff and Counterdefendant,

vs.

CORECOMM NEWCO, INC.

Defendant, Counterclaimant,  
and Third-Party Plaintiff,

vs.

AMERITECH CORP., *et al.*,

Third-Party Defendants.

.....

Case No. 1:01 CV 2057

JUDGE DONALD C. NUGENT  
MAGISTRATE JUDGE HEMANN

**CORECOMM'S  
OPPOSITION TO  
AMERITECH'S  
MOTION TO DISMISS  
COUNTS 2 AND 3 OF  
FIRST AMENDED  
COUNTERCLAIMS  
AND THIRD-PARTY  
COMPLAINT**

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## **I. Issues to be Decided**

Defendant/Counterclaimant CoreComm Newco Inc. (“CoreComm”) respectfully submits this opposition to Plaintiff’s/Counterdefendants’ Motion to Dismiss Counts 2 and 3 of CoreComm’s Counterclaim. The first issue presented is whether a monopoly telephone company’s alleged anticompetitive conduct violates § 2 of the Sherman Act, under that Act’s standards and in light of government regulation of aspects of the industry. 15 U.S.C. § 2. The second issue presented is whether a plaintiff can pursue a tort claim alongside a separate and distinct contract claim.

## **II. Summary of Argument**

In Count 2 of its Counterclaim, CoreComm alleges that Counterdefendant/Third-Party Defendants Ameritech Corp. and its parents and certain affiliates (“Ameritech”), through a variety of anticompetitive acts, prevented CoreComm and others from competing effectively against it, thereby preserving its monopoly over local telephone service for consumers and businesses in greater Cleveland and greater Columbus. Ameritech’s motion to dismiss Count 2 fails because under well-established Supreme Court precedent, CoreComm’s allegations state a claim for illegal maintenance of monopoly power in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

In Count 3, CoreComm alleges that Ameritech fraudulently or negligently made certain misrepresentations to CoreComm, which induced CoreComm to act to its detriment. Ameritech has moved to dismiss Count 3 on the basis that CoreComm is seeking economic losses allegedly recoverable pursuant to CoreComm's breach of contract claim. In fact, CoreComm's claim in Count 3 for negligent or fraudulent misrepresentation is factually distinct from its breach of contract claim, arises from a duty separate from the contract, and should not be dismissed.

### **III. Ameritech's Motion to Dismiss Count 2 Should Be Denied**

Most of CoreComm's antitrust claims concern Ameritech's affirmative acts of disruption and obstruction of CoreComm's operations. CoreComm's remaining allegations concern Ameritech's unreasonable refusals to deal and denials of access to an essential facility, namely the local telephone network and "last-mile" loop between the customer's premises and the nearest telephone switching facility, which are under Ameritech's control.

Ameritech's motion rests on two legal arguments, neither of which is sustainable. First, it contends that the misconduct complained of does not violate the Sherman Act. To make this argument, Ameritech first rewrites CoreComm's claims, omitting many and mischaracterizing others. It then ignores a substantial body of Supreme Court and appellate court precedent about what constitutes monopolistic behavior. Ameritech admits that conduct that violated the antitrust laws prior to the 1996 enactment of the Telecommunications Act ("96 Act") still violates those laws. Memorandum in Support of Plaintiff and Third-Party Defendants' Motion to Dismiss Counts Two and Three of Defendant's First Amended Counterclaim ("Ameritech's Brief") at 21; 47 U.S.C. §§ 251-275 and other scattered sections of Title 47. All of the conduct alleged by CoreComm would have violated the Sherman Act in 1995 and still violates that statute today.

Ameritech also asserts that any conduct addressed by the '96 Act is not covered by the Sherman Act. This contention ignores the express language of the '96 Act, public statements of many interested and knowledgeable parties – including an Ameritech affiliate – and a substantial body of precedent applying the antitrust laws to regulated industries. In particular, it ignores precedent applying the antitrust laws to the telephone industry despite the pervasive regulatory scheme established by the Communications Act of 1934, and indeed applying the antitrust laws to conduct very similar to that alleged here. *Southern Pacific Communications Co. v. American*

*Tel. & Tel.*, 740 F.2d 980, 999-1000 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1103 (7<sup>th</sup> Cir.), *cert. denied*, 464 U.S. 891 (1983); *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1320-30 (D.D.C. 1978).

***A. CoreComm's Claims Must Be Construed in the Light Most Favorable to CoreComm***

For purposes of deciding a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6), the Court must construe the claims at issue in the light most favorable to the party asserting them. *In re Sofamor Danek Group, Inc.*, 123 F. 3d 394, 400 (6<sup>th</sup> Cir. 1997); 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1357 (1990). All factual allegations made by the claimant are taken as true. *Id.* A motion to dismiss should be denied unless there is no set of facts in support of the claim that could establish the violation alleged. 2 MOORE'S FEDERAL PRACTICE § 12.34 (3<sup>rd</sup> ed. 2002).

***B. CoreComm's Claims State a Cause of Action Under § 2 of the Sherman Act***

**1. CoreComm's Section 2 Claims**

CoreComm alleges that in myriad ways, large and small, Ameritech has persistently worked to drive up CoreComm's costs and disrupt its operations. For certain products or services not covered by an immediate regulatory directive, Ameritech has refused to deal with CoreComm altogether or has provided access only on wholly unreasonable terms and conditions. *E.g.*, ¶¶ 158-178, 226-33, CoreComm's First Amended Counterclaims and First Amended Third-Party Complaint. CoreComm alleges that Ameritech took these steps for the purpose of impeding CoreComm's ability to compete against Ameritech and preserving Ameritech's monopoly position in the marketplace. ¶139. CoreComm asserts that this conduct reduced Ameritech's sales and made business sense for Ameritech only as a means of preserving

Ameritech's monopoly power. ¶ 151. Moreover, CoreComm alleges, Ameritech's strategy has succeeded. Its monopoly position is intact. ¶¶ 153-57.<sup>1</sup>

## 2. The Conduct Alleged Violates the Sherman Act

Section 2 of the Sherman Act prohibits the willful maintenance of monopoly power through anticompetitive conduct "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The statute proscribes behavior that "(1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605 n.32, quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW 78 (1978).

Virtually any conduct can be the basis of a § 2 claim if it is exclusionary and preserves monopoly power.<sup>2</sup> "The means of illicit exclusion, like the means of legitimate competition, are

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<sup>1</sup> CoreComm alleges a variety of anticompetitive acts, some more significant than others; it is their sheer volume and persistence that have significantly impeded CoreComm's ability to compete. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 738 F.2d 1509, 1522, n.18 (10<sup>th</sup> Cir.), *aff'd*, 472 U.S. 585 (1985). It is not necessary that each act alleged, by itself, constitute an independent antitrust violation. *Id.* at 1522 n.18. Moreover, the legality of this conduct cannot properly be evaluated piecemeal; it must be assessed within the context of all of Ameritech's conduct. Even Ameritech actions – such as disrupting service to CoreComm customers whenever CoreComm tried to compete through its own switch facilities, and pursuing protracted sham litigation to drive up CoreComm's costs – that significantly harmed competition in their own right are more properly assessed in the context of the entirety of Ameritech's exclusionary actions. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). What matters is the "whole picture, and not merely the individual figures in it." *Continental Ore*, 370 U.S. at 699, quoting *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6<sup>th</sup> Cir. 1944), *aff'd* 328 U.S. 781 (1946).

<sup>2</sup> The defendant may offer evidence of a legitimate business justification for its conduct, and if that evidence is persuasive, the burden of proof reverts to the plaintiff to rebut that evidence. But the absence of a business justification is not an element of the plaintiff's initial claim. See *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001). Nevertheless, CoreComm has alleged the absence of any legitimate business justification for Ameritech's exclusionary conduct. *E.g.*, ¶¶ 137, 139-47, 151, 177.

myriad.” *Microsoft*, 253 F.3d at 58. The issue is not the specific action itself, but its purpose and effect. If the defendant’s action harms a competitor without improving the quality of the defendant’s products or increasing its volume of sales, it is exclusionary.

a. Disruption of Competitor’s Business. Affirmative obstruction of a competitor’s business can violate the Sherman Act. For example, depriving competitors of the cost-efficient means of distribution, even if some channels of distribution remain open, can violate § 2. *Microsoft*, 253 F.3d at 63. Buying up an essential input in greater quantities than needed, solely to prevent a competitor from obtaining the input, can violate the Sherman Act. *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 996 (9<sup>th</sup> Cir. 1986). Requiring some of one’s suppliers not to do business with a competitor can constitute monopolization. *Potters Med. Ctr. v. City Hosp. Ass’n*, 800 F.2d 568, 576-77 (6<sup>th</sup> Cir. 1986).

What the conduct in these cases has in common is that it reduces the ability of a competitor to compete effectively without improving the quality or price of the defendant’s products or services, or the efficiency of its operations. Rather, the major competitive effect of the conduct is to harm the competitor. The defendant’s purpose in undertaking the conduct is to exclude competition, not to prevail over competitors through competition on the merits. *Advanced Health-Care Services v. Radford Community Hosp.*, 910 F.2d 139, 149 (4<sup>th</sup> Cir. 1990).

CoreComm alleges that Ameritech has affirmatively disrupted its operations, a form of blatantly exclusionary behavior. Disconnecting CoreComm’s customers and sending error-laden bills that took CoreComm many hours to parse did not improve Ameritech’s products or services, or make it more efficient; indeed much of this conduct increased Ameritech’s own costs as well as those of CoreComm. Moreover, Ameritech’s actions reduced the volume of services it sold in the short term to CoreComm and other competitive telephone companies. This conduct

made no business sense for Ameritech except as a means of preventing the growth of competition in local telephone markets and preserving its monopoly.

Ameritech asserts repeatedly that it did not entirely refuse to deal with CoreComm. *E.g.*, Ameritech’s Brief at 5, 8. Except for some significant exceptions discussed below, CoreComm agrees. With respect to most services, Ameritech could not simply refuse to deal with CoreComm and other competitive firms, because doing so would have jeopardized its ability to offer long-distance service in its local Ohio service areas. *See* 47 U.S.C. § 271. Rather, Ameritech’s main response to the specter of local competition was to undertake a campaign of disruption and ambush that relentlessly drove up the costs and undermined the quality of services offered CoreComm and other competitive firms. This is classic monopolistic conduct.

b. Refusals to deal. Despite Ameritech’s repeated assertions to the contrary,<sup>3</sup> refusals to deal can violate § 2 of the Sherman Act. “The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.” *Aspen Skiing*, 472 U.S. at 601. Indeed,

Most rights are qualified. . . . The right [to select one’s customers]. . . is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.

*Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951), *quoted in Aspen Skiing*, 472 U.S. at 601.

Moreover, refusing to deal on reasonable terms is tantamount to a direct refusal to deal. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 541 (7<sup>th</sup> Cir. 1986) (“Agreeing to deal on unreasonable

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<sup>3</sup> Ameritech frames the issue as whether it has a duty to “assist” its competitors. CoreComm does not seek Ameritech’s assistance, nor does it allege that it has been denied assistance. Rather, CoreComm alleges that Ameritech has obstructed its business and refused to deal with it. ¶¶ 158-78.

terms is merely a type of refusal to deal.”). A monopolist cannot evade its obligation to deal with competitors, absent a legitimate business reason, by imposing wholly unreasonable terms and then claiming that it is, in fact, “doing business.”

While a seller ordinarily has the right to decide with whom to deal, *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), if its refusal to deal creates or preserves monopoly power and has no reasonable business justification, it violates § 2. The line of cases supporting this proposition stretches back to the early years of the last century. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, the defendant was the plaintiff’s supplier. The defendant expanded its operations, became a competitor of the plaintiff, and then ceased offering the plaintiff goods at a discount. 273 U.S. 359 (1927). It did, however, sell the plaintiff its goods at the regular retail price. *Id.* at 369. In *Lorain Journal*, a newspaper refused to sell advertising to businesses that also purchased ads on a fledgling local radio station. 342 U.S. 143 (1951). In *Aspen Skiing*, the defendant, which owned three ski slopes, had for some time sold one-week passes in conjunction with the plaintiff, which owned an adjacent ski slope. The passes were good at all four mountains. The defendant then ceased participating in the joint tickets, and even refused to sell them to the plaintiff at the regular retail price. 472 U.S. at 593-95 (1985). In each of these cases, the Supreme Court held that the defendant’s refusal to deal violated § 2 of the Sherman Act. And this list is not exhaustive. The essential facilities cases discussed below are a subset within the category of refusal-to-deal cases, and there are additional cases as well.

Monopolists are held to a higher standard than other businesses, because they have so much power to restrict competition. *See, e.g., Microsoft* 253 F.3d at 70, 82; *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945) (“*Alcoa*”). A firm with 20% of a relevant market will not be able to block competition by refusing to sell its goods or services to

another; a monopolist may well be able to do so. Not surprisingly, a firm with 20% of a market usually does not refuse to sell its goods to a willing buyer – having no prospect of monopolizing its market, its interest lies in maximizing its sales.

A monopolist's refusal to deal with its competitors is more suspect under the antitrust laws than the refusal of a firm to do business with a would-be customer that is not a potential or actual competitor. In the latter situation, anticompetitive effects are unlikely and most refusals to sell to an entity that is only a customer are upheld. Most of the antitrust refusal-to-deal cases involve a monopolist's refusal to sell to competitors. *See, e.g., Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7<sup>th</sup> Cir. 1986).

All of the refusal-to-deal conduct adjudged by the courts to constitute monopolization had a substantially adverse effect on the ability of the defendant's competitors to compete against it. So, too, do the refusals to deal alleged by CoreComm against Ameritech. *E.g.*, ¶¶ 158-78, 228-29. Ameritech has selected certain popular services it knows are likely to be desired by potential CoreComm customers, such as voicemail, Privacy Manager, and inside wire maintenance, and has either refused to make them available or made them available only on extremely unfavorable terms. ¶¶ 212-18. It has even refused to make voicemail available to CoreComm on the terms it offers its own regular retail customers. ¶¶ 215. CoreComm's ability to compete effectively has been significantly impaired as a result. ¶¶ 217, 222. Ameritech's refusals and conditions have no legitimate business justification. *E.g.*, ¶ 177. These allegations are solidly within the long line of Supreme Court and appellate precedent condemning refusals to deal that preserve monopoly power, and they clearly state a claim for violation of § 2.<sup>4</sup>

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<sup>4</sup> Ameritech argues that its refusals to deal were not anticompetitive in those instances in which CoreComm was able to purchase an inferior substitute from another source. For example, Ameritech argues that CoreComm's ability to get carriage of intra-LATA toll calls from long-

c. Refusal to share an essential facility. A related line of cases going back many decades requires a monopolist that controls a facility that is essential to competition in a particular market and cannot feasibly be duplicated, to share access to that facility on reasonable terms in the absence of a legitimate business reason to deny access. *E.g.*, *MCI v. AT&T*, 708 F.2d at 1132-33; *see also United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 409-11 (1912).<sup>5</sup> These cases are a subset of the refusal-to-deal cases. An essential facilities case requires proof of: (1) control of an essential facility by a monopolist; (2) a competitor's practical inability to duplicate the facility; (3) the monopolist's denial of access to the competitor; and (4) the feasibility of providing access. *MCI v. AT&T*, 708 F.2d at 1132-33. More than the refusal-to-deal cases, the essential facilities cases focus on the essentiality of the facility to which access has been denied, but all of these cases consider the monopolist's intent and the competitive effects of its conduct.

In *Otter Tail Power Co. v. United States*, a monopoly electric utility company "refused to sell . . . new [municipal] power systems energy at wholesale and refused to agree to wheel power from other suppliers of wholesale energy." 410 U.S. 366, 371 (1973). The defendant's

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distance carriers bars any relief for Ameritech's refusal to sell shared transport services for carrying those calls. There are significant quality and price differences between shared transport and the alternatives. ¶ 186. It would be remarkable indeed to allow Ameritech to escape antitrust liability solely because CoreComm found a solution that prevented Ameritech's refusals from putting it out of business altogether. Moreover, such a result would be inconsistent with the antitrust laws, which look to the actual competitive effect of the alleged conduct. If the conduct had anticompetitive effects, the fact that it was not immediately fatal to competition is immaterial. *See Microsoft*, 253 F.3d at 62-64, 70 (foreclosing a competitor from the most efficient channels of distribution can violate § 2 even if not all channels are foreclosed).

<sup>5</sup> *U.S. v. AT&T* was also in large part an essential facilities refusal-to-deal case. AT&T prohibited connection of most "foreign" equipment to its system and refused to deal with competitive suppliers of long-distance service. 461 F. Supp. at 1318. This case did not produce a Supreme Court decision, since it was settled during the presentation of the defense case. *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 1011, 1015 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). Certainly AT&T would not have agreed to

power lines were the only available means of delivering wholesale power to the municipality, so the company's refusal to deal prevented the municipal system from distributing retail power in the defendant's stead and from acquiring wholesale power from a competitor of the defendant. *See also Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Sunshine Cellular v. Vanguard Cellular Systems, Inc.*, 810 F. Supp. 486, 497 (S.D.N.Y. 1992). And in the leading essential facilities decision in modern times, *MCI v. AT&T*, the defendant refused to interconnect the plaintiff's long-distance traffic with its local telephone facilities. 708 F.2d 1081 (1983). CoreComm's allegations about Ameritech's refusals to interconnect its local telephone infrastructure, and its refusals to interconnect on reasonable terms, are well within the principles established in these cases.

### 3. The Cases Cited by Ameritech Do Not Support Its Argument

In support of its assertion that "generally, . . . the antitrust laws do not impose on a monopolist a duty . . . to deal with [its competitors]" Ameritech's Brief at 13, Ameritech cites five cases, none of which supports its position:

- a. *United States v. Colgate & Co.*, 250 U.S. 300. This case did not involve a monopolist. "The indictment . . . makes no reference to monopoly, and proceeds solely upon the theory of an unlawful combination." 250 U.S. at 302.
- b. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370. The court held that since the defendant's initial conduct had *created* new competition, requiring it to continue to "nurture" that competition over time would create perverse incentives for firms in the future not to undertake similar procompetitive conduct. The court also found that the defendant had a legitimate business justification for its actions. *Id.* at 376-77. *Olympia Leasing* thus differs in

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massive divestiture and restructuring, however, had it thought it could persuade the high court it had no duty to deal with competitors.

two important respects from CoreComm's claims: CoreComm and other competitive telephone companies were not initially created by Ameritech, and CoreComm alleges that Ameritech has no business justification for its conduct.

In *Olympia Leasing*, Judge Posner confirmed the continuing validity of the principle that a monopolist's refusal to deal with a competitor can violate § 2:

the monopolistic-refusal-to-deal cases qualify rather than refute the no-duty-to-help-competitors cases. If a competitor is also a customer his relationship to the monopolist is not only a competitive one. The monopoly supplier who retaliates against customers who have the temerity to compete with him, by cutting such customers off, is severing a collateral relationship in order to discourage competition.

*Olympia Leasing*, 797 F.2d at 376.

c. *Abcor Corp. v. AM Int'l Inc.*, 916 F.2d 924 (4<sup>th</sup> Cir. 1990). This case also did not involve a monopolist; the Court held that the defendant lacked monopoly power. It also noted that, “[t]he right to refuse to deal, however, is not unfettered” and can violate the Sherman Act if “conceived in monopolistic purpose or market control” 916 F.2 at 929-30, citing *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 802 (8<sup>th</sup> Cir. 1987), quoting *Times-Picayune Pub. Co.*, 345 U.S. 594, 625 (1953).

d. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 263 F.2d 603 (2d Cir. 1979). This case concerned a monopolist's refusal to *predisclose* its new camera and film format to its competitors before it released those products to the public. Developing new products is clearly procompetitive, even if undertaken by a monopolist, and is encouraged by the antitrust laws. Notably, this defendant did not refuse to sell its products to its competitors once the products had become available to other customers. *Id.* at 281.

e. *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7<sup>th</sup> Cir. 2000). Elsewhere in its brief, *see* Ameritech's Brief at 13, Ameritech also cites *Goldwasser* for its “no-duty-to-deal” argument. Some language in the *Goldwasser* decision indeed suggests that refusals to deal never violate the

antitrust laws. But that court also noted that a monopolist's refusal to deal with a competitor "if part of a broader effort to maintain its monopoly power" could violate § 2. 222 F.3d at 398, citing *Aspen Skiing*, 472 U.S. at 600-01.

#### 4. Ameritech Mischaracterizes Some CoreComm Claims and Ignores Others

Ameritech presents a caricature of CoreComm's claims, recasting them to resemble very different allegations that were properly dismissed in another case. Ameritech entirely bypasses the gravamen of CoreComm's claims – that Ameritech's conduct was exclusionary and preserved monopoly power – and fails to address many of CoreComm's specific allegations. Even in describing those allegations that it does acknowledge, Ameritech mischaracterizes some<sup>6</sup> and summarizes many of the rest in terms so vague as to deprive them of their meaning.

a. Disruption of CoreComm's Operations. CoreComm alleges that Ameritech disrupted service to numerous CoreComm customers when switching them from resale service to a more fully competitive service utilizing CoreComm's own switching facilities. ¶¶ 185-86.

CoreComm alleges that Ameritech imposed other conditions on these transfers, without justification, delaying the resumption of full service to these customers. ¶¶ 183-84.

CoreComm contends that in other ways Ameritech unreasonably postponed making the transfers at all. ¶¶ 181, 188. Ameritech's conduct is alleged to have contributed to CoreComm's subsequent decision to abandon plans to transfer additional customers to its own switches.

¶ 189. CoreComm asserts that Ameritech's actions were significant because facilities-based

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<sup>6</sup> Ameritech says CoreComm admits being "the most successful" competitive telephone company in Ameritech's Ohio service area. Ameritech's Brief at 9. This is incorrect – CoreComm does not allege anything about its relative rank among competitive firms. Ameritech's assertion that CoreComm is "succeeding" is also incorrect. *Id.* While the mere fact that CoreComm is still in business puts it ahead of many other competitive carriers in Ameritech's Ohio territory, CoreComm has never turned a profit. *See* Form 10-K, CoreComm Ltd. at <http://www.core.com/web/about/index/htm>.

competition such as CoreComm attempted to offer provides more potential for effective competition, in terms of innovative functionality, service options, and pricing, than simple resale. *See, e.g.*, ¶¶ 134-35, 179, 189. To the extent that Ameritech addresses these claims at all, it seeks to mute them by describing them as “not satisfy[ing] . . . [Ameritech’s] obligations under the ICA [Interconnection Agreement] and TCA [’96 Act] . . . to provide sufficient operations support systems and properly trained personnel.” Ameritech’s Brief at 8. But the case law makes clear that interfering with the efficient operation of a competitor, as CoreComm has claimed, can violate § 2. *Microsoft*, 253 F.3d at 63.

Similarly, Ameritech ignores CoreComm’s claim, ¶ 203, that although Ameritech knew its resale-to-UNE-P<sup>7</sup> conversion process was not commercially viable, it advised CoreComm that it was ready to convert CoreComm’s customers, then dropped service to many of CoreComm’s customers when its process failed. UNE-P service is more viable for a competitive firm like CoreComm over the long term than simple resale, and Ameritech’s disruptions of service to CoreComm customers being transferred to UNE-P hurt CoreComm competitively in at least two ways: in the short term the disruptions caused CoreComm to lose some customers and fail to attract others it would otherwise have enrolled; and in the long term the resulting delays relegated CoreComm for some months to less viable and less competitive resale service. ¶¶ 179-190. Ensuring that customers’ use of a competitor’s service will have “unpleasant consequences” can violate § 2. *Microsoft*, 253 F.3d at 65, *citing United States v. Microsoft Corp.*, Findings of Fact ¶¶ 171-72, 87 F. Supp. 2d 30 (D.D.C. 2000).

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<sup>7</sup> UNE-P, or “unbundled network elements platform,” is one form of wholesale telephone service.

b. Price-quality squeeze. Ameritech also ignores CoreComm's allegation at ¶ 222, which alleges a price-quality squeeze. By selling CoreComm inferior services for the price of regular services, Ameritech has imposed a squeeze on CoreComm: CoreComm must expend additional time and money to bring the services up to acceptable quality standards, although it has paid a wholesale price to Ameritech that assumes the services when delivered to CoreComm will be of satisfactory quality. In this way, Ameritech imposes unreasonable burdens and costs on CoreComm that impede the latter's competitive effectiveness. *Cf. Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 29 (1<sup>st</sup> Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) (not addressing squeeze where regulation at only one level); *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976 (7<sup>th</sup> Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

c. Sham litigation. CoreComm alleges that Ameritech engaged in sham litigation in order to drive up CoreComm's costs. ¶¶ 152, 197-99, 227-30, 232. For example, CoreComm cites an FCC Notice of Apparent Liability stating that Ameritech's parent had "continued to argue to state commissioners, and to this commission," even after its obligation had been made "not only 'ascertainably certain,' but abundantly clear," and that this litigation forced "other carriers to expand time and resources . . . trying to obtain what [Ameritech's parent] was already obligated to provide." *In the Matter of SBC Communications, Inc.*, File No. EB-01-IH-0030, 16 FCC Rcd. 1012 (Jan. 18, 2001), ¶¶ 22-23. Ameritech mischaracterizes these claims as simply challenging Ameritech's effort to seek "administrative determinations regarding the terms and conditions under which it was required to provide network elements." Ameritech's Brief at 8. Of course, the essence of CoreComm's contention is that Ameritech initiated or prolonged proceedings *when it knew the outcome* would be adverse to it, simply to slow the process of enforcing rights

and responsibilities, prolong regulatory and business uncertainties, and drive up the costs of CoreComm and other competitive firms.

While conceding that CoreComm's sham litigation claims are not covered by the '96 Act, Ameritech argues that they are "inextricably intertwined" with other claims that, Ameritech incorrectly asserts, do arise under the Act. This is nonsensical. Sham litigation is an independent antitrust violation wholly unrelated to the nature of the allegedly sham litigation. *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 59 (1993) ("a plaintiff who . . . [demonstrates] both the objective and subjective components of a sham must still prove a substantive antitrust violation"). Neither the objective component (action objectively baseless) nor the subjective component (action an attempt to interfere with the business relationships of a competitor) defined by the Court relate to the nature of the challenged proceedings.

d. Essential Facilities. CoreComm alleges that it is not feasible to duplicate the local telephone infrastructure before opening for business as a competitive telephone company, although in the absence of exclusionary conduct by Ameritech CoreComm intended to begin to duplicate some of that infrastructure in order provide facilities-based competition. ¶ 111. CoreComm also alleges that the "last mile," the connection running between a customer's home or business premises and the nearest telephone company switch, cannot be feasibly duplicated with existing or anticipated technology. *Id.* Ameritech agrees that entrants cannot "immediately . . . duplicate an incumbent provider's physical infrastructure." Ameritech's Brief at 3.

The local telephone infrastructure is controlled by Ameritech, which has refused access to CoreComm in connection with certain services, either at all or, in some cases, on commercially reasonable terms and conditions. *E.g.*, ¶¶ 110, 214, 227, 231. *See MCI v. AT&T*,

708 F.2d 1081. Ameritech has no legitimate business reason for refusing access to CoreComm, and has acted for the purpose of preserving its monopoly power. *E.g.*, ¶ 233. These allegations clearly state a cause of action for violation of the essential facilities doctrine under § 2.

These are only some examples of CoreComm's allegations of exclusionary and monopolistic behavior by Ameritech. Throughout its brief, Ameritech's summaries of CoreComm's claims omit the elements that make them antitrust rather than regulatory claims – that the alleged acts were anticompetitive and preserved monopoly power. Ameritech's Brief at 7-8, 14. To discuss the antitrust sufficiency of CoreComm's claims while omitting CoreComm's allegations about the nature and effects of this conduct is to set up a straw man.

5. CoreComm States a Claim Under Long-standing Precedent

Ameritech acknowledges that the types of conduct that would have violated the antitrust laws before passage of the '96 Act still violates those laws today. Ameritech's Brief at 21. CoreComm agrees. Had the events in question occurred prior to the '96 Act, this case could have been filed back then. All of the conduct alleged by CoreComm would have violated the Sherman Act prior to 1996. It violates that same statute today.

***C. The '96 Act and the Sherman Act Both Govern Local Telephone Service***

1. It Has Been Recognized Since the Adoption of the '96 Act that Some Conduct It Covers Is Also Covered by the Sherman Act

Conduct that violates the '96 Act will also violate the Sherman Act if it is anticompetitive and preserves monopoly power. The '96 Act itself provides that nothing therein:

shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

47 U.S.C. § 152.<sup>8</sup>

As explained by President Clinton when he signed the '96 Act:

The Act's emphasis on competition is also reflected in its antitrust savings clause. This clause ensures that *even for activities allowed under or required by the legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully.*

Statement on Signing the Telecommunications Act of 1996, 1996 Public Papers of the Presidents, vol. 1 (Feb. 8, 1996) (emphasis added).

In its initial order regarding the '96 Act, the FCC stated,

Finally, we clarify, as one commenter requested, that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law.

Implementation of the Local Competition Provisions of Telecommunications Act of 1996, CC Docket 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15565 (Aug. 8, 1996).

When it is in their interest to do so, Ameritech's affiliates have themselves emphasized that the antitrust laws continue, since the enactment of the '96 Act, to apply to their dealings with competitive telephone companies:

All of the ['96] Act's and the Commission's specific statutory and regulatory protections are backed up by the federal and state antitrust laws.

Application of SBC Comms. to Provide In-region, Inter-LATA Services in Oklahoma, CC Docket No. 97-121, Brief in Support of Application at 84-85 (April 11, 1997), *App. Denied, Memorandum Opinion and Order*, 12 FCC Rcd. 8685 (1997).

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<sup>8</sup> In 47 U.S.C.A. § 152, *see* Historical and Statutory Notes, Applicability of Consent Decrees and Other Law at 53 (2001).

## 2. The '96 Act and the Sherman Act Have Parallel Purposes and Partly, But Not Entirely, Overlap

The partial overlap between the '96 Act and the Sherman Act reflects the largely parallel purposes of the two statutes. The two laws embody two different congressional approaches to a single goal – promoting competition.

The '96 Act is intended to encourage competition in local and long-distance telephone markets by allowing incumbent firms to enter long-distance service if they interconnect with competitive local firms in certain enumerated ways. Among other things, it requires incumbent local telephone companies to take specific steps before they may offer long-distance service in their home territories. 47 U.S.C. §§ 251(c), 252, 271. Not only is the statute limited to one industry, it is not all-encompassing even as to the telecommunications marketplace – there are significant aspects of local service that it does not address.

Notably, some of CoreComm's allegations relate to local service and other issues that are wholly unaddressed by the '96 Act, including (a) Privacy Manager (§ 112); (b) sham litigation (§§ 152, 197-99, 227-30); (c) voicemail (§§ 212-14); (d) inside wire maintenance (§ 218); and (e) the price/quality squeeze (§ 222). Many other aspects of the relationship between incumbents and competitive firms, not at issue in this case, are also outside the scope of the '96 Act. One example is conduct relating to reciprocal compensation for Internet calls, recently the subject of litigation. *Intercarrier Compensation for ISP Bound Traffic*, CC Docket No. 99-68, *Order on Remand and Report and Order*, FCC 01-131, 2001 FCC LEXIS 2340 (rel. Apr. 27, 2001). Moreover, antitrust offenses such as price-fixing and market allocation are not covered by the narrowly focused '96 Act. 104 P.L. 104, 110 Stat. 56.

The Sherman Act, in contrast, is a “comprehensive charter of economic liberty,” *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). In relevant part, it prohibits the

maintenance of monopoly power through exclusionary conduct of any kind. 15 U.S.C. § 2; *Microsoft*, 253 F.3d at 64, citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Its goal is to prevent the maintenance of monopoly power by any means other than “superior skill, foresight, and industry.” *Alcoa*, 148 F.2d at 430. Both statutes govern incumbents’ business dealings with competitive telephone companies, each in its own way.

Although the import of much of its brief is to the contrary, in acknowledgement of the ’96 Act’s express antitrust savings clause Ameritech eventually concedes that the ’96 Act does not impliedly repeal the antitrust laws with respect to local telephone service. Ameritech’s Brief at 21-22. Even in the absence of clear guidance from Congress, a regulatory statute does not displace the antitrust laws unless there is a “clear repugnancy” between the two. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 351 (1963) (although “governmental controls of American banking are manifold,” 374 U.S. at 327, “[n]o express immunity is conferred [and r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored” 374 U.S. at 350). The clear repugnancy test is based on the bedrock principle of statutory construction that wherever possible statutes should be read to complement rather than conflict with one another. *OXY U.S.A. v. Babbitt*, 122 F.3d 251, 258 (5<sup>th</sup> Cir. 1997). Repeal is to be implied only where necessary to make both statutes work, and even then, only to the extent necessary. *Silver v. New York Stock Exch.* 373 U.S. 341, 357 (1963). None of Ameritech’s alleged misconduct is required or even authorized by the ’96 Act; Ameritech does not contend otherwise. Therefore, even were there no savings clause, in local telephone markets the antitrust laws would continue to play their “indispensable role . . . in the maintenance of a free economy.” *Philadelphia Nat’l Bank*, 374 U.S. at 348.

Indeed, if no conduct were covered by both the '96 Act and the Sherman Act, the '96 Act's savings clause would be superfluous – there would be no antitrust jurisdiction to preserve. Statutes should not be read in a way that renders some of their provisions meaningless. *Smoot v. United Transp. Union*, 246 F.3d 633, 644 (6<sup>th</sup> Cir. 2001). The very existence of the savings clause demonstrates that conduct covered by the '96 Act is also subject to the Sherman Act.

### 3. The Antitrust Laws Are Frequently Left in Place to Protect Competition Even in a Highly Regulated Industry

It is common for the antitrust laws to coexist alongside a pervasive regulatory scheme. *E.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (electric power); *United States v Philadelphia Nat'l Bank*, 374 U.S. at 350-51 (banking); *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 217-18 (1966) (shipping); *Silver*, 373 U.S. at 357 (securities); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) (broadcasting); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (agriculture); *Aloha Airlines, Inc. v. Hawaiian Airlines Inc.*, 349 F. Supp. 1064, 1068 (D. Haw. 1972) (air travel). Regulatory and antitrust regimes often overlap. *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 729 (9<sup>th</sup> Cir. 1981) (“[t]here is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry”).

Ameritech implies that regardless of the types of conduct engaged in by incumbent firms, the antitrust laws did not apply to telephone markets before 1996. It suggests that Congress, rather than adopting the '96 Act, could have “simply imposed an ‘antitrust solution’ and eliminated all regulatory restrictions on competition.” Ameritech’s Brief at 13. But the antitrust laws have applied to telephone markets for many decades, together with pervasive regulation. *See, e.g.*, *Southern Pacific Communications*, 740 F.2d at 999-1000; *MCI v. AT&T*, 708 F.2d at 1103; *United States v. AT&T*, 461 F. Supp. at 1320-30. Indeed the restriction to which the '96

Act was primarily addressed – barring incumbent local telephone firms from offering long-distance service – was imposed by the consent decree in *United States v. American Tel. & Tel.*, 552 F. Supp. 131 (D.D.C. 1982). This *antitrust* case was based on the old AT&T’s misuse of its monopoly on local service to monopolize long-distance service and telecommunications equipment markets. *Id.* at 160.

Action subject to regulatory oversight may violate the antitrust laws. In another antitrust case against the old AT&T, that company was charged with various anticompetitive acts, including both obstruction of competition and refusals to deal with a competitive entrant into long-distance service. *MCI v. AT&T*, 708 F.2d at 1092-1100. AT&T argued that MCI had not been authorized by the FCC to carry telephone traffic and that AT&T had not been authorized to interconnect with it. *Id.* at 1096. The court held that the FCC had authorized both actions and that AT&T’s refusal to interconnect constituted illegal maintenance of monopoly power. *Id.* at 1133 (“MCI produced sufficient evidence at trial for the jury to conclude that it was technically and economically feasible for AT&T to have provided the requested interconnections, and that AT&T’s refusal to do so constituted an act of monopolization”).

#### 4. The Agencies Charged With Enforcement of the '96 Act and the Sherman Act Agree that Both Statutes Govern Local Telephone Markets

*Dicta* in a recent 7<sup>th</sup> Circuit decision cited by Ameritech, *Goldwasser*, 222 F.2d 390, suggests that conduct that violates the '96 Act *cannot* violate the Sherman Act, because the '96 Act “take[s] precedence” over the antitrust laws. *Id.* at 401. The *dicta* are wrong, for the reasons already discussed. The '96 Act contains an express antitrust savings clause. Even if it did not, the standard for implied repeal is clear repugnancy, which is absent.

The United States Department of Justice and the Federal Communications Commission have publicly stated that the *Goldwasser dicta* are incorrect. In their view, the antitrust laws

continue to apply to local telephone service, and application of the antitrust laws does not interfere with the regulatory scheme. They have filed two appellate briefs on the issue. *Brief for the United States and Federal Communications Commission as Amici Curiae, Covad Communications Co. v. BellSouth Corp.*, No. 01-16064-C (11<sup>th</sup> Cir. 2001); *Brief for the United States and Federal Communications Commission as Amici Curiae, Intermedia Communications, Inc. v. BellSouth Telecommunications, Inc.*, No. 01-10224-JJ (11<sup>th</sup> Cir. 2001). (Attachments A and B, respectively).

The FCC's position is particularly significant. The stated basis for the *dicta* in *Goldwasser* is the possibility of a conflict between antitrust relief and the regulatory scheme. The expert agency charged with implementing and supervising the regulatory scheme, which should know best if there is any real risk of harm, has twice stated its view that antitrust litigation is not a threat to its regulatory scheme. Moreover, as the Department of Justice and FCC point out, the time to address this concern is at the relief phase of a case, not at its outset. *See Covad Amici Brief* at 23 (Attachment A); *Intermedia Amici Brief* at 19 (Attachment B).

5. Prior District Court Decisions on Antitrust Claims by Competitive Telephone Companies Are Divided

Ameritech asserts that CoreComm asks this Court to apply the antitrust laws to anticompetitive post-'96 Act conduct by incumbent telephone companies "for the first time." Ameritech's Brief at 18. In fact, however, at least four federal district judges have held that anticompetitive conduct by an incumbent telephone company can violate § 2 even if it also violates the '96 Act. *Stein v. Pac. Bell Tel. Co.*, No. C 00-2915 SI (N.D. Cal. Feb. 25, 2002) (Illston, J.); *MGC Communications, Inc. v. Sprint Corp.* (D. Nev. Dec. 13, 2000) (Pro, J.); *Cal-Tech Internat'l Telecom Corp.*, No. C-97-2105-CAL (N.D. Cal. Oct. 25, 2000) (Legge, J.); *Electro-Net Intermedia Consulting, Inc. v. Sprint-Florida, Inc.*, No. 4:00cv176-RH (N.D. Fla.

September 20, 2000) (Hinkle, J.). *See also Davis v. Pac. Bell*, No. C 01-0260, 0585 SI (N.D. Cal. Jan. 10, 2002) (Illston, J.).<sup>9</sup> In addition, *Intermedia Communications, Inc. v. BellSouth Telecomms., Inc.* was settled while on appeal, after the Department of Justice and the Federal Communications Commission filed as amici urging that the district court's dismissal of the antitrust claims be vacated and the case remanded.

In some cases, motions to dismiss were granted in part because, as in *Goldwasser* itself, the complaint alleged that conduct violated § 2 by virtue of the fact that it violated the '96 Act. *See, e.g., Law Offices of Curtis v. Trinko v. Bell Atlantic Corp.*, 123 F. Supp. 2d 748, 742 (S.D.N.Y. 2000) (“the mere fact that a monopolist has violated another statute does not transform such offense into a violation of the antitrust laws”) (appeal pending); *cf. MGC Communications, Inc. v. BellSouth Telecomms., Inc.*, 147 F. Supp. 2d 1344, 1350 (quoting *Goldwasser*: “plaintiffs did not state a section 2 claim when they accused Ameritech of failing to comply with its duties under the Telecommunications Act”). These decisions provide no authority for dismissal of CoreComm's antitrust claims, since CoreComm has alleged separate and specific antitrust harm, wholly apart from and unrelated to '96 Act violations.<sup>10</sup> Notably, while Ameritech asserts that CoreComm's claims track those in other cases, it has not provided the other complaints.

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<sup>9</sup> Most of the district court decisions on antitrust claims brought by competitive telephone firms since the passage of the '96 Act are unreported, and CoreComm is unsure that it has identified all relevant cases. All post-*Goldwasser* decisions known to CoreComm are cited in this brief.

<sup>10</sup> Motions or appeals are pending in at least five cases: *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, No. 01-7746 (2d Cir.); *Covad Communications Co. v. BellSouth Corp.*, No. 01-16064-C (11<sup>th</sup> Cir.); *Cavalier Tel., LLC v. Verizon Virginia Inc.*, Notice of Appeal (E.D. Va. March 28, 2002); *Bell Atlantic Network Servs., Inc. v. Ntegrity Telecontent Services*, (D.N.J. Civil No. 99-5366 (AET) (motion to dismiss initially denied; reconsideration granted by subsequent judge, new motion to dismiss pending), *Covad Communications Co v. Bell Atlantic Corp.*, No. CA-99-1046 (D.D.C.). CoreComm has not reviewed the complaints in these cases and does not know the nature of their allegations.

In short, the courts are divided on the relationship between the antitrust laws and the '96 Act. The cases that are consistent with the provisions of the '96 Act, its subsequent interpretation by Ameritech's affiliate, antitrust precedent, and the views of the U.S. Department of Justice and the expert agency charged with supervising the regulatory scheme, have all held that allegations that a monopolist obstructed competition, unreasonably refused to deal, and failed to share an essential facility, state a claim under § 2.

6. CoreComm's Claims Differ in Material Ways from the *Goldwasser* Complaint

Ameritech's Brief is in large measure addressed to the complaint dismissed by the Seventh Circuit in the *Goldwasser* case. The heart of the *Goldwasser* complaint was that proof of '96 Act violations, without more, constitutes proof of marketplace harm in violation of § 2. 222 F.3d at 394-95; *see also Goldwasser* Class Action Complaint (Attachment C). The *Goldwasser* plaintiffs hoped to escape the need to prove anticompetitive effects, relying on the mere fact of '96 Act violations to prove that the defendant's conduct was exclusionary. *Id.* This attempt was appropriately rejected by the Seventh Circuit Court of Appeals.

CoreComm has not asserted that Ameritech's conduct violates the Sherman Act *because* it violates the '96 Act. Nor has it simply alleged actions that in fact violate the '96 Act and then covered such claims with a generic assertion harm to competition. In contrast, CoreComm asserts marketplace harm, wholly independent of the '96 Act, with particularity, *e.g.*, ¶¶ 139-157.

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Finally, in *Building Communications, Inc. v. Ameritech Services, Inc.* No. 97- CV-76336 (E.D. Mich. June 21, 2001) and *Supra Telecommunications and Information Systems, Inc. v. BellSouth Telecommunications, Inc.*, No. 99-1706-CV-Seitz (S. D. Fla. June 8, 2001), the courts followed *Goldwasser* language asserting the lack of overlap between the antitrust laws and the '96 Act. Notably, other than quoting from *Goldwasser* neither case cites any antitrust case in its discussion of this topic.

This is the claim that was fatally absent from the *Goldwasser* complaint, and perhaps absent from other complaints as well. 222 F.3d at 401; *Goldwasser* Complaint.

Moreover, several of CoreComm’s allegations concern services and conduct nowhere addressed by the ’96 Act, namely Privacy Manager (§ 112); sham litigation (§§ 152, 197-99, 227-30); voicemail (§§ 212-14); inside wire maintenance (§ 218); and a price-quality squeeze (§ 222). The *Goldwasser* complaint alleged only violations of the ’96 Act. See *Goldwasser* Complaint (Attachment C).

CoreComm’s claims are materially different from those advanced in *Goldwasser*. Ameritech’s Brief fails to address any of those differences.

7. Whether the Conduct Alleged Violates the ’96 Act Is Not Determinative of the Validity of the Sherman Act Claim.

Ameritech’s motion to dismiss CoreComm’s monopolization claims incorrectly asserts that they are “based entirely on [Ameritech’s] alleged failure to comply with . . . the ’96 Act. Ameritech’s Brief at 9. This is incorrect. CoreComm has not alleged that Ameritech’s conduct violates the ’96 Act. Although some of it might, that issue is not determinative of CoreComm’s antitrust claims. Moreover, a number of CoreComm’s allegations concern conduct that is not addressed by the ’96 Act.

As Ameritech emphasizes, some requirements of the ’96 Act go beyond the Sherman Act’s broad prohibition on monopolistic misconduct.<sup>11</sup> Moreover, given the narrowness of many of the ’96 Act’s requirements, a failure to comply with one or a few of them likely would not, by itself, violate the Sherman Act, since it likely would not affect competition in the marketplace as

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<sup>11</sup> Ameritech is incorrect in its assertion that the ’96 Act requires incumbents to “assist” their competitors. The statute only requires them to do business on ordinary terms with their competitors in certain specific ways. 47 U.S.C. § 251 (a)-(c).

a whole. For both of these reasons, misconduct that violates the '96 Act does not necessarily violate the Sherman Act even if the actor is a monopolist.

If Ameritech's conduct did violate the '96 Act, while not determinative of CoreComm's antitrust claims, this fact would tend to establish the absence of any business justification for the conduct. "[W]here conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws." 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 248 (4<sup>th</sup> ed. 1997).

#### **IV. Ameritech's Motion to Dismiss Count 3 Should Be Denied**

CoreComm alleges in Count 3 that Ameritech induced CoreComm to convert customers from resale to UNE-P by means of negligent or fraudulent misrepresentations. Ameritech has moved to dismiss Count 3 on the ground that it seeks economic losses recoverable pursuant to CoreComm's breach of contract claim. In fact, CoreComm's claim in Count 3 for negligent or fraudulent misrepresentation is factually distinct from its breach of contract claim, and seeks damages separate from and in addition to those recoverable for Ameritech's breach of the ICA. Accordingly, Ohio's economic loss doctrine is inapplicable, and Ameritech's motion to dismiss Count 3 must be denied.

Ohio law, as explained in the cases cited by Ameritech in support of its motion, bars a claim for tort between parties in privity of contract in the limited circumstance in which "the only duty breached is a contractual duty," *Picker Int'l, Inc. v. Mayo Found.*, 6 F. Supp. 2d 685, 689 (N.D. Ohio 1998), and the claimant does not allege a "separate and unique duty not created by contract which would exist even in the absence of a contract." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App. 3d 137, 150 (Summit App. 1996). Here, in contrast,

CoreComm has alleged the breach of a duty that arose separate and apart from the ICA. Under Ohio law, the duty not to make negligent or fraudulent misrepresentations "may arise in any situation where one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Central States Stamping Co. v. Terminal Equip. Co., Inc.*, 727 F.2d 1405, 1409 (6<sup>th</sup> Cir. 1984). Under the ICA, Ameritech is obligated to fill CoreComm's orders for resale and UNE-P services in conformance with the contractually stipulated standards. Ameritech's failure to provide UNE-P services that satisfied the terms of the ICA constituted a breach of contract for which CoreComm seeks damages pursuant to its breach of contract claim. The ICA does not, however, obligate Ameritech to represent to CoreComm its readiness to transition CoreComm's customers from resale to UNE-P. Thus, when Ameritech voluntarily undertook to affirmatively represent to CoreComm that Ameritech could and would convert CoreComm's customers from resale to UNE-P without disruption, through "just a billing change," ¶ 256, thereby inducing CoreComm to exercise its right to switch its customers from resale to UNE-P services, Ameritech assumed a duty to CoreComm independent of its contractual duties, the breach of which gave rise to tort damages outside the scope of the contract between the parties.<sup>12</sup>

CoreComm has pled the required elements for either negligent or fraudulent misrepresentation. CoreComm has alleged that Ameritech, which is in the business of

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<sup>12</sup> Ameritech also argues that "[w]here a contract exists governing a party's claim, the economic loss doctrine bars the party from suing another in tort for purely pecuniary losses that amount to the benefit of its bargain under the contract between the parties." Ameritech's Brief at 23. For the reasons stated above, CoreComm's tort claim is not governed by the contract, but rather involves actions and duties outside the contract's scope. Moreover, even if the Court were to grant Ameritech's motion to dismiss CoreComm's negligent misrepresentation claim under the economic loss doctrine, CoreComm's claim for fraudulent (*i.e.*, knowing) misrepresentation must stand because Ohio law does not appear to apply the economic loss doctrine to bar a fraud

providing both resale and UNE-P services, which was CoreComm's sole source of information regarding the readiness and quality of its UNE-P services, ¶¶ 257, 259, 263-64, and which knew that CoreComm would necessarily rely to its detriment upon information provided by Ameritech regarding such services, ¶¶ 257, 263-64, on multiple occasions provided material, false information to CoreComm, ¶¶ 255, 260, 262, 267, upon which CoreComm justifiably relied, ¶ 259, causing CoreComm and its customers to suffer harm. ¶ 270.

As CoreComm clearly alleges in Count 3, CoreComm reposed confidence in Ameritech representations because Ameritech was the only party that could possibly have knowledge of the matters represented, and Ameritech knew that CoreComm would repose confidence in its representations for that reason. Indeed, CoreComm advised Ameritech that it desired to place conversion orders if Ameritech could provide assurance that the conversions would not result in problems. ¶¶ 256, 262. Therefore, when Ameritech undertook to represent to CoreComm the status of its UNE-P service and its readiness to convert CoreComm's customers, an actionable duty of care that was wholly independent from Ameritech contractual duties arose. When Ameritech negligently or fraudulently misrepresented that the conversions would require "just a billing change," ¶ 256, Ameritech breached the applicable duty of care, giving rise to CoreComm's tort claim. As a direct and proximate result of Ameritech's misrepresentations, CoreComm sustained damages, including out-of-pocket expenses, loss of revenue for service changes not communicated to CoreComm, and loss of customer goodwill, that it would not have incurred but for its reliance on Ameritech's false assurances. ¶ 270.

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claim. *See Trgo v. Chrysler Corp.*, 34 F. Supp. 2d 581, 595 (N.D. Ohio 1998); *see also Purizer Corp. v. Battelle Memorial Inst.*, 2002 WL 22014, \*4, fn. 7 (N.D. Ill. 2002).

## V. CONCLUSION

Two decades ago, AT&T's long-standing monopoly on telephony in the United States was partly dismantled through an antitrust suit, and competition was introduced into markets for telephone equipment and long-distance service. Dramatic innovations in service and reductions in price followed. At the time, it was thought that current technology would not support efficient competition in local service. Since then there have been significant advances, and today it is agreed that local competition is feasible. Whether antitrust violations by the incumbent telephone company – concerned to preserve its decades-old monopoly power – are now robbing consumers and businesses in Cleveland and Columbus of the benefits that local competition would bring, is the important subject of this suit. Dismissal should not be lightly granted.

For the reasons set forth, Ameritech's motion to dismiss Counts 2 and 3 of CoreComm's First Amended Counterclaims and Third-Party Complaint should be denied in its entirety.

Respectfully submitted,

/signed/

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